(1) No. 93 1911 MAY 26 1994

In The

Supreme Court of the United States

October Term, 1993

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility,

Petitioner,

vs.

DEMONT R.D. CONNER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

2. Whether, assuming, *arguendo*, state prison rules create a "liberty interest" in avoiding disciplinary segregation, an inmate who has confessed to facts which establish misconduct is entitled, by reason of the Due Process Clause of the Fourteenth Amendment, to call witnesses at his prison disciplinary hearing?

3. Whether in light of the uncertainty created by this Court's precedents regarding the creation of "liberty interests" in the prison setting, and in light of the uncertainty in the law bearing on prisoners' rights to call witnesses at prison disciplinary hearings, the Ninth Circuit erred in reversing the judgment of the District Court and in stripping Petitioner of her qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, or, alternatively, whether the Court should grant the writ, vacate the judgment, and remand in light of *Elder v. Holloway*, 114 S. Ct. 1019 (U.S. Feb. 23, 1994)?

PARTIES TO THE PROCEEDING

Petitioner Cinda Sandin was, at the times relevant to this proceeding, a Unit Team Manager at Halawa Correctional Facility, Department of Corrections, State of Hawaii. She appears in this Court in her official and individual capacities. Petitioner was one of sixteen state prison officials sued by Respondent Demont R.D. Conner in the amended complaint in the District Court in Civil No. 88-0169 (D. Haw. am. comp. filed Sept. 8, 1989). She is the only official left in the litigation with respect to Respondent Conner's procedural due process claim in connection with an August 28, 1987, disciplinary hearing. *See* Pet. App. A8-A9. Ms. Sandin is the only Petitioner.

Respondents include Demont R.D. Conner, who at all times was and is serving a thirty-years-to-life prison sentence in the Hawaii state penal system. Other Respondents are Theodore Sakai, Acting Administrator, Department of Corrections; Harold Falk, Director of Corrections, and various employees of Halawa Correctional Facility, *i.e.*, Lawrence Shohet, Corrections Supervisor, William Oku, Administrator, Leonard Gonsalves, Chief of Security, Francis Sequeira, Unit Team Manager, and Adult Corrections Officers William Summers, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshall, William Paaga, and Brian Lee, all of whom were Defendants below. Also named as a Defendant below, and as a Respondent here, is Dr. Kim Thorburn, a medical officer with responsibility for Halawa facility. Also a Defendant below and a Respondent here is the State of Hawaii. The

PARTIES TO THE PROCEEDING – Continued

State and each of the officer respondents have an interest in the outcome of (and support) Ms. Sandin's petition, and are named as nominal respondents only pursuant to S. Ct. R. 12.4. All of the officer respondents are named, as below, in their official and their individual capacities.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Cinda Sandin, Unit Team Manager, Halawa Correctional Facility, in her official and individual capacities, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 2, 1993, as amended by the opinion and judgment entered February 2, 1994.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit entered February 2, 1994, is reported at 15 F.3d 1463 (9th Cir. 1994), and is reprinted in Appendix ("App.") "A," *infra*. The order of the Court of Appeals, filed February 25, 1994, denying Petitioner's petition for rehearing, is unreported and is printed in App. "E." The initial opinion of the Court of Appeals, entered June 2, 1993, is reported at 994 F.2d 1408 (9th Cir. 1993). The order and judgment of the District Court from which appeal was taken by Respondent Conner are unreported and are printed at Apps. "C," and "D," *infra*.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was entered June 2, 1993, *see* Pet. App. A1, and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed June 16, 1993. On February 2, 1994, the Ninth Circuit issued an amended opinion, but did not dispose of the petition for rehearing. *Id.* On February 25, 1994, the Court of Appeals denied the petition for rehearing and rejected the suggestion for *en banc* review. *See* App. "E," The time in which this Petition may be filed therefore extends to and includes May 26, 1994, and this Petition is timely. Jurisdiction is invoked here under 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the District of Hawaii was alleged to have been conferred by 28 U.S.C. § 1343(3). Jurisdiction to review the final judgment

entered in the District Court in favor of all Defendants lay in the United States Court of Appeals pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND ADMINISTRATIVE PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part that:

> [No State shall] deprive any person of life, liberty, or property, without due process of law.

Subchapter 2, Title 17, of the Hawaii Administrative Rules, and which governed the adjustment process at Halawa Correctional Facility at all times relevant to this litigation, has been reprinted in its entirety in App. "F," *infra*, Pet. App. A41 *et seq.*

STATEMENT OF THE CASE

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), this Court held that a prison's rules that permitted, but did not mandate, denial of visitation privileges under certain circumstances did not create a "liberty interest" in receiving visitors. *Id.* at 464. In response to the request of thirty-one States' Attorneys General, the Court found it was unnecessary to create a "bright line" rule "that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement

protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " *Id.* at 461 n.3. "Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," "express[ing] no view on the proposal and leav[ing] its resolution for another day." *Id.* at 462 n.3.

This case concerns not the due process implications of visitation with those *outside* the prison, who are presumed to be innocent, but the ability of prison officials to segregate inmates within the prison for violation of disciplinary rules. In this context, where the need to be free of intrusive federal review is at its height, the Ninth Circuit has held that Hawaii prison rules create a "liberty interest" in avoiding "disciplinary segregation" without more. Hawaii does not grant "good time" credits, and even the most serious disciplinary finding has no necessary impact upon parole. The main issue in this case is whether Hawaii's prison rules, which authorize, but do not require, the imposition of disciplinary segregation, create a federally protected "liberty interest" solely because those rules require, as a matter of state law, "substantial evidence" of misconduct before an official exercises the discretion to order, or not order, an inmate to a period of segregation. A second issue is whether an inmate who has confessed to facts that constitute misconduct is nonetheless entitled, as a matter of federal Due Process requirements, to call witnesses to his prison disciplinary hearing. A third issue is whether the prison official who failed to ensure the availability of witnesses for the

accused inmate should have been stripped by the Ninth Circuit of her qualified immunity from federal suit.

1. Inmate Demont R.D. Conner is a Hawaii state prisoner serving a thirty-years-to-life sentence for attempted murder, robbery, kidnapping, burglary, and rape. Pet. App. A2, Clerk's Record 83 (Exh. "A"). Conner, at the times relevant to this Petition, was housed at Halawa Correctional Facility, the only maximum security correctional facility in the Hawaii penal system. By law, Halawa is charged with providing "extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities," including "[i]ndividuals committed because of serious predatory or violent crimes against the person"; "intractable recidivists"; "[p]ersons characterized by varying degrees of personality disorders"; "[r]ecidivists identified with organized crime"; and "[v]iolent and dangerously deviant persons." Haw. Rev. Stat. § 353-7(b)(1) (1985 & Supp. 1992). At the times relevant here, Halawa facility inmates were governed by a disciplinary system that consisted of Hawaii's general criminal laws and an "adjustment process" administered by the prison itself. *See* App. "F," *infra*.

2. Under the "adjustment process," prison administrators have defined a variety of "prohibited acts," categorizing them as to their severity. "Misconduct" is categorized as "greatest misconduct," "high misconduct," "moderate misconduct," "low moderate misconduct," and "minor misconduct." Pet. App. A43, A45, A47, A49, A51. The maximum punishment for the most serious "misconduct" is "[d]isciplinary segregation up to sixty days," or "[a]ny other sanction other than disciplinary

segregation." Haw. Admin. R. § 17-201-6(b), Pet. App. A45. The "other sanctions" to which the administrative rule refers includes loss of privileges, such as access to non-legal mail or the commissary, but do not include any sanction that lengthen's inmate's term of incarceration. Hawaii does not employ any system of "good time" credits, and the Hawaii State Paroling Authority is free to ignore a record of misconduct in granting parole. *See* Haw. Rev. Stat. §§ 353-68, 353-69 (1985). Parole may be granted "at any time after the prisoner has served the minimum term of imprisonment fixed according to law," *id.* § 353-68, and so long as "it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society," *id.* at 353-69. In the event an inmate is accused of a "serious rule violation," *see* Pet. App. A52, the prison convenes an "adjustment committee," which, in relevant respect, is required to make "[a] finding of guilt," only "where: (1) The inmate or ward admits the violation or pleads guilty" or "(2) the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b), Pet. App. A57-A58. After a finding of guilt, "[t]he adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation," *id.* § 17-201-19, Pet. App. A58. The committee need not impose any sanctions upon the prisoner.

3. On August 13, 1987, Respondent Conner was charged with a variety of misconducts based upon the following report of Adult Corrections Officer Gordon Furtado:

On Thu. Aug. 13, 1987 at approx. 0900 hrs. I ACO G. FURTADO while on duty in Module A along with ACO R. AHUNA escorted INMATE D. CONNER from his cell (quad II) to the module program area. At this time I informed Inmate CONNER to move against the wall to be strip-searched before leaving the module. Inmate CONNER then stripped, faced the wall and squatted. I then asked Inmate CONNER to put both hands on the wall and lift up both feet one at a time to which he did with no incident.

I then asked him to step back, bend over and with both hands spread his buttocks so that I could check for contraband in the rectal area to which he said "Fuck!" in an angry tone of voice. This part of the search was thus completed, but as Inmate CONNER turned around and faced this writer he stared at me and stated "Why are you harassing me?" I informed him that I'm just following a routine procedure. He then stated in a very sarcastic voice "What you got something personal against me! Why you harassing me?" I then told him all you have to do is just listen and follow what I tell you to do but Inmate CONNER just kept on making sarcastic remarks about being harassed and the way that this writer was doing his job.

At this time because of the tense atmosphere and also the very provoking attitude towards this writer, Sgt. SUMMERS who witnessed this incident canceled Inmate CONNER's privilege of religious counselling. Inmate CONNER was then escorted back to his cell by this writer and ACO D. COELHO.

It should be noted that as Inmate CONNER went through the strip search procedures he

> moved very slow and questioned every move as if trying to hinder the search, hoping that this writer might overlook a certain area. Inmate CONNER appeared to be very unruly in his attitude toward this writer.

Clerk's Record 83; Exh. "K"; Pet. App. A61-A62. Conner was given notice of the charges, and the opportunity to contest them before an adjustment committee. The Committee concluded that Conner had "use[d] physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant" (a high misconduct); "us[ed] abusive or obscene language to a staff member"; and engaged in "[h]arassment of employees" (the latter both low-moderate misconducts). Pet. App. A66. The Committee, in its August 31, 1987, disposition of the charges, gave the following as its contemporary statement for its decision:

> The Committee based their decision upon the inmate's statements that during the strip search procedure he turned around after squatting and looked at the ACO. He was then directed to "spread his cheeks" by ACO Furtado as part of the new strip search procedure. He felt angry, humiliated and apprehensive. He then "eyed up" ACO Furtado and was hesitant to comply. He further indicated that he dislikes ACO Furtado and feels he should not work on the module. The inmate admitted saying the word "fuck" during the procedure. The Committee also reviewed the submitted reports. Witnesses were unavailable due to move to the medium facility and being short staffed on the modules.

Clerk's Record 83; Exh. "K"; Pet. App. A66. Although Conner's "high misconduct" was ultimately expunged as a result of an internal prison review, Conner filed a federal lawsuit in the United States District Court for the District of Hawaii against Petitioner, who served as Chairman of the adjustment committee, and other officials, alleging a variety of defects in the adjustment committee process, including the allegedly improper denial of witnesses. After over three years of litigation, the District Court granted summary judgment to Defendants. *See* App. "C."

4. The Ninth Circuit, in a published opinion by Judge Reinhardt, joined by Judges Browning and Norris, reversed and remanded in part. Pet. App. "A." In relevant provision,[1] the panel concluded that "Conner had a liberty interest, protected by the fourteenth amendment,

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[1] In a portion of the decision not challenged by this Petition, the Ninth Circuit struck down, on procedural grounds, the application of a prison rule barring communication in a language other than English to what inmates asserted was Islamic prayer. *See* Pet. App. A9-A12. Because the Ninth Circuit did not forbid the prison to proscribe acts susceptible of communicative effects in languages other than English, *see id.* at A11 n.9, left open the issue of qualified immunity, *id.* at A12, and affirmed the grant of qualified immunity in related cases, *see Smith v. Elkins*, No. 93-1585 (9th Cir. Mar. 2, 1994), and State officials have repealed the rule at issue on the "Islamic prayer" claim, certiorari is not sought as to the specific issues implicated by the Court's ruling pertaining to Conner's alleged claim "that his first and fourteenth amendment rights were violated when prison officials punished him for praying aloud in Arabic." *See* Pet. App. A9. This Petition, rather, concerns the Court's reversal of "summary judgment as to Conner's claim regarding disciplinary segregation." *Id.; see also id.* at A18-19.

in not being arbitrarily placed in disciplinary segregation." *Id.* at A3. To reach this conclusion, the panel relied entirely upon the "substantial evidence" provision of the prison rules. The Court found the rule that mandates "freedom from disciplinary segregation" if "the inmate does not admit guilt," and "the committee does not find substantial evidence," to "provide explicit standards that fetter official discretion." *Id.* at A4. Then, "[h]aving found that Conner possessed a liberty interest in not being confined to disciplinary segregation," the panel found, despite Conner's own incriminating statements, that Petitioner had not sufficiently demonstrated "the adequacy of its justification for denying an inmate the right to present witnesses." *Id.* at A8. The Court reversed the summary judgment, even as to claims for monetary relief against Petitioner, stating that "[t]he right to call witnesses at a disciplinary hearing has been clearly established since *Wolff v. McDonnell*[, 418 U.S. 539 (1974),] was decided in 1974." *Id.* at A9. Although the Court, on a timely petition for rehearing, reinstated summary judgment for Defendants on other claims, it ultimately let the foregoing rulings stand.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel's decision in this case overturning summary judgment as it pertains to Conner's challenge to the 1987 misconduct hearing threatens an undue – and unprecedented – expansion of federal judicial review of prison management decisions, and an equally disturbing constriction of the doctrine of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800

(1982). In the circumstances of this case, the exacting federal review directed by the Ninth Circuit does not – and cannot – serve to restore "good time" credits, or compel or even necessarily affect, parole. Such review does not rid Hawaii's prisons of unsafe environmental conditions, or deter violence against inmates, either from errant correctional officers, or from other inmates; nor does it serve to protect the important but limited First Amendment rights inmates enjoy despite their incarcerated status. Nor does it even protect state inmates from irrational and arbitrary assignments to disciplinary segregation. After all, even without procedural Due Process protections, inmates would be entitled under the Equal Protection Clause to treatment that meets minimum rationality.

Instead, without reason or precedent to back it, the Ninth Circuit has simply made *every* disciplinary proceeding a basis for intrusive federal review, and for extensive litigation of personal-capacity damage claims, regardless of the limited effect of the discipline measures at issue, and without heed to the most pertinent fact: a *confession* of inmate misconduct.

This Court should grant review, if for no other reason than to protect *inmates* from the adverse consequences of the decision below. For under that decision, prison administrators have far diminished incentive to formulate disciplinary systems containing standards of proof, for no matter how minimal the time in segregation, and no matter how great the discretion to impose no penalty at all, the mere announcement of a standard of proof thereby hog-ties prison administrators with the full-blown requirements imposed upon prison disciplinary

decisions that do have a necessary impact on the length or very nature of confinement. For these reasons, and because the decision below conflicts with the decisions of this Court and of the other courts of appeals, the Court should grant the petition for certiorari. Because the Ninth Circuit did not have the benefit of this Court's decision in *Elder v. Holloway*, 114 S. Ct. 1019 (U.S. Feb. 23, 1994), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of the *Elder* decision.

I. This Court Should Grant Review, Because The Ninth Circuit's Reading Of The Requirements For A State-Created "Liberty Interest" In The Prison Setting Is In Direct Conflict With This Court's Precedents And With Decisions Of Other Courts Of Appeals; In Any Case, The Issue At A Minimum Is An Unresolved Issue Of Nationwide Importance And Should Be Settled Now.

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), the Court determined that prison regulations that authorized administrators to deny visitation privileges in particular circumstances failed to establish a "liberty interest" because "[t]hey stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Id.* at 464. Thus, the Court reasoned, although "[v]isitors *may* be excluded if they fall within one of the described categories," "they need not be." *Id.* Here, as in *Thompson*, inmates found by "substantial evidence" to have committed disciplinary infractions "may be" assigned to segregation for a period of time, but they "need not be." This, without more ought

to have compelled the Ninth Circuit to affirm with respect to the disciplinary segregation issues; instead, the Ninth Circuit followed the reasoning of the *dissent* in *Thompson*, *see* 490 U.S. at 475 (Marshall, J., joined by Brennan, and Stevens, JJ., dissenting).

As this Court has stated in a related context, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Indeed, other courts of appeals to have addressed issues of this nature have dutifully followed *Thompson's* reasoning.

The decision below, for example, directly conflicts with the Eighth Circuit's analysis in *Burgin v. Nix*, 899 F.2d 733 (8th Cir. 1990). There, the regulations at issue effectively stated that the prison officials must find an inmate to be incorrigible before he may be given a sack lunch instead of the usual tray lunch. Applying *Thompson*, the Court held that the regulations did not create a liberty interest in being served tray lunches because the regulations did not mandate that prison officials serve sacked lunches to inmates found to be incorrigible. 899 F.2d at 735. Likewise, the Ninth Circuit's ruling conflicts with the Seventh Circuit's analysis in *Woods v. Thieret*, 903 F.2d 1080 (7th Cir. 1990) (per curiam). There, while prison rules "mandate[d] *who* shall make the determinations and *what* shall be considered," including "three substantive predicates," "they do not mandate any particular outcome with regard to the substantive predicates." *Id.* at 1083. Because a decision to place an inmate on "lockdown" was not mandated by the prison rules for

any specific situation the rules did not create a liberty interest. *Id.* The Ninth Circuit's analysis in this case thus not only conflicts with this Court's own holding in *Thompson*, but at least two circuits' construction of that holding.

Review should be granted, in that, at a minimum, federal judicial recognition of "liberty interests" as stemming from state prison disciplinary schemes that do not affect "good time" credits and that do not necessarily impact on parole considerations raises unsettled issues of nationwide import that the Court should review. In *Thompson* itself, the Court was able to avoid a substantial claim, presented both by the Petitioner in that case, and more than thirty States' Attorneys General, *see* 490 U.S. at 455 n.*, urging the Court "to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " 490 U.S. at 461 n.3. The Court "express[ed] no view on the proposal and le[ft] its resolution for another day." *Id.* at 462 n.3. The decision below calls upon this Court to decide this issue, which is of vast importance to all of the States.

The Ninth Circuit's decision to extend due process protection to any prison disciplinary proceeding that threatens to impose disciplinary segregation is not tied to any principle that this Court has espoused in its Due Process jurisprudence.

In the leading case in this area, *Wolff v. McDonnell*, 418 U.S. 539 (1974), for example, Nebraska had created a scheme for the forfeiture of good-time credits, without providing due process protections. The Court subjected the scheme to analysis of "the process due," after determining that, because "the State ha[s] created the right to good time and itself recogniz[ed] that its deprivation is a sanction authorized for major misconduct," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. As the Court would later hold in *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." The Court has also emphasized "that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." *Hewitt v. Helms*, 459 U.S. 460, 470 (1983). In *Hewitt*, the Court did state that a liberty interest had been created by Pennsylvania's procedures for administrative detention; but the Court found that no Due Process violation had been shown. *See* 459 U.S. at 472-78. Thus, *Hewitt's* statements that the State had "created a protected liberty interest" are ultimately *dicta*, and "[i]t is the holdings of [the Court's] cases, rather than their dicta,

that we must attend." *Kokkonen v. Guardian Life Insurance Co.*, 62 U.S.L.W. 4313, 4315 (U.S. May 15, 1994) (Scalia, J., for a unanimous Court). It is doubtless for just this reason that the "bright-line" rule proposed, and deferred, in *Thompson* remains a pressing question on which this Court has "express[ed] no view," and left "for another day." 490 U.S. at 462. In light of Judge Reinhardt's opinion for the court below, that day, at a minimum, has come. The writ should be granted.

II. Review Should Be Granted To Correct The Ninth Circuit's Intrusive Review Of State Prison Disciplinary Decisions To Refuse To Compel Witness Testimony.

While recognizing, in trial settings, that the judge on the scene "is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceedings of a trial," *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985), the Ninth Circuit gave no deference to the prison administrators who refused to call witnesses at Conner's request, since, in the words of the Committee, "[w]itnesses were unavailable due to move to the medium facility and being short staffed on the modules." In this case, however, Conner admitted to having " 'eyed up' " and cursed at Correctional Officer Furtado during the strip search, admitting to every element of at least two different disciplinary infractions. As this Court held in *Arizona v. Fulminante*, 111 S. Ct. 1246, 1255 (1991), "[a] defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him,' " and, in light of this confession, the record on its

face proves sufficient reason to deny witnesses, even if Respondent had a "liberty interest."

As this Court has made clear since *Wolff*, "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." 418 U.S. at 566. *See also Ponte v. Real*, 471 U.S. 491, 496 (1985). For years, every lawyer practicing in the federal system, when he or she requests discovery in a civil case, has certified that a particular request is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Fed. R. Civ. P. 26(g) (as amended Mar. 2, 1987); *see* Fed. R. Civ. P. 26(g)(2)(C) (as amended Dec. 1, 1993). The quoted language from *Wolff*, which at a minimum reflects similar concerns, has prompted rulings in virtually every Circuit that stand for the proposition that prison disciplinary committees have broad authority to reject proffered testimony as cumulative or irrelevant. *See, e.g., Forbes v. Trigg*, 976 F.2d 308, 318 (7th Cir. 1992) (allowing refusal to call witnesses whose testimony is "irrelevant or repetitive" or "could have added little" to the proceeding); *Scott v. Kelly*, 962 F.2d 145, 147 (2d Cir. 1992) (" 'a prisoner's request for a witness can be denied on the basis of irrelevance or lack of necessity' "); *Ramer v. Kerby*, 936 F.2d 1102, 1104 (10th Cir. 1991) (allowing denial of prisoner requests if officials "affirmatively determine" that the proposed testimony

"would be irrelevant, cumulative, or otherwise unnecessary for the committee to come to a fair resolution of the matter"); *Brown v. Frey*, 889 F.2d 159, 168 (8th Cir. 1989) (en banc).

Here, where Conner had confessed to the material elements of the charged conduct, and where neither he nor the Ninth Circuit took issue with the validity of his confession, the Ninth Circuit's remand simply makes nonsense of the law. As this Court ruled in a related context, "if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute . . . which has some significant bearing" on the matter in controversy. *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam). Here, as in *Codd*, Conner "made out no claim under the Fourteenth Amendment that he was harmed by the denial of [witnesses]." *Id.* at 628. At the very least, the record does not allow any reasonable factfinder to conclude that Conner was unconstitutionally denied witnesses.

Because the Ninth Circuit's reversal of summary judgment on the denial of witnesses issue conflicts with this Court's decisions in *Wolff*, and *Ponte*, and with a broad array of rulings in the courts of appeals, the Court should grant certiorari.

III. Review Should Be Granted, At A Minimum, To Correct The Ninth Circuit's Drastic Disregard Of *Harlow* Immunity.

As the foregoing demonstrates, it is clear that the Ninth Circuit was unwarranted in concluding that Conner had raised a genuine dispute of material fact with

respect to the merits of his claims "at all," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1993). But what is perhaps most disturbing of all is the Court of Appeals' drastic curtailment of the generous protections of the doctrine of qualified immunity in this case.

As this Court has emphasized, qualified immunity is a "protective" doctrine that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (quoting *Malley v. Briggs*, 475 U.S. 334, 341 (1986)). The scope of the doctrine's protections is not to be judged by reference to "abstract rights," *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). And this is especially so where the constitutional rights at stake "have been expressed in terms of 'unreasonable' " government conduct. *Id.* at 643. Since this Court adopted an "objective" test for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been clear "that officials performing discretionary functions are not subject to suit when [federal] questions are resolved against them only after they have acted," and "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). The "decisive fact is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Id.* Such "facts," at worst, are present, and mandate immunity.

In denying immunity to Petitioner Sandin, the Ninth Circuit fundamentally misconstrued the teachings of this Court, and in a way that plainly warrants review, or, at a minimum, a summary remand. *Cf. Inaba v. Soong*, 112 S. Ct. 40 (U.S. Oct. 7, 1991).

First, if nothing else, this Court's explicit reservation of issues in *Thompson*, *see* 490 U.S. at 462 n.3, constitutes the very sort of authoritative deferral that should allow officials to continue to press legal claims and defenses without fear of personal liability. After all, when this Court "leave[s]" "for another day," a particular defense to Due Process challenges, it is intolerable that state officials be subject to personal-capacity damage actions by provoking review of that defense. To let the Ninth Circuit's decision stand would not only "substantially thwart the development of important questions of law by freezing the first initial decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J., for a unanimous Court); it would freeze the law in such a way that a legal issue would never be litigated.

Second, wholly apart from the " 'bright line' " argument that renders any particularized analysis of Hawaii's prison rules irrelevant to the Due Process issues in this case, it is hardly "incompetent" to assert that *Thompson's* "mandatory outcomes" test precludes the conclusion that Hawaii has created liberty interests. The fact that *Thompson*, without response to Justice Marshall's dissent, held that no liberty interest was created because visitors "need not be" excluded, is – and should be – enough to warrant qualified immunity as a matter of law on the record present. For this reason, too, review is warranted.

Third, by relying on the "abstract" right to call witnesses outlined (for good-time-credit States, such as Nebraska) in *Wolff*, the Ninth Circuit committed the very error that this court reversed in *Anderson v. Creighton*, 483 U.S. 635 (1987). The determination, by Judges Reinhardt,

Browning, and Norris, to strip Petitioner of her qualified immunity for denying witnesses, even though inmate Conner undisputedly confessed to swearing at Correctional Officer Furtado, "convert[s] the rule of qualified immunity that [this Court's] cases plainly establish into a rule of virtually unqualified liability." 483 U.S. at 635. Like other refusals by the Ninth Circuit to recognize qualified immunity, *see, e.g.*, *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1992), this conversion should be reversed.

At a minimum, the Ninth Circuit's decision appears to be colored by the narrow review given to immunity issues in the Ninth Circuit prior to this Court's reversal in *Elder v. Holloway*, 114 S. Ct. 1019 (1994). *Elder* unequivocally mandates that "[w]hether an asserted federal right was clearly established at a particular time so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts,' " which, "like the generality of such questions, must be resolved *de novo* on appeal." 114 S. Ct. at 1023. Most significantly, *Elder* mandates that "[a] court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.' " *Id.* By remanding Petitioner for "a fuller development of the record" (Pet. App. A9), where, *inter alia*, the record absolutely and unequivocally shows that Connor confessed, the Ninth Circuit simply abdicated its appellate function, and disobeyed the requirements of the *Elder* decision.

Because the Ninth Circuit did not have the benefit of this Court's decision in *Elder*, at a minimum the Court may wish to grant the petition, vacate the judgment, and

remand for further consideration in light of *Elder v. Holloway, supra.*

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari. Because the decision in *Elder v. Holloway,* 114 S. Ct. 1019 (U.S. Feb. 23, 1994), was handed down only two days before rehearing was denied, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Elder.* In any event, the Court should grant the petition for certiorari.

Dated: Honolulu, Hawaii, May 26, 1994.

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APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMONT R.D. CONNER, *Plaintiff-Appellant,* v. THEODORE SAKAI et al., *Defendants-Appellees.*	No. 91-16704 D.C. No. CV-88-0169-ACK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted November 5, 1992*
Honolulu, Hawaii

Filed June 2, 1993
Amended February 2, 1994

Before: James R. Browning, William A. Norris, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

*The panel unanimously finds this case suitable for submission on the record and briefs without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

OPINION

REINHARDT, Circuit Judge:

DeMont R.D. Conner, a Hawaii state prisoner serving a thirty-years-to-life sentence, appeals pro se the district court's grant of the state's motion for summary judgment, and the district court's denial of his cross-motion for summary judgment on his § 1983 suit against a number of prison officials[1] and the State of Hawaii. We reverse, as to certain of the defendants, the district court's grant of summary judgment in the state's favor on certain of Conner's claims: that he was improperly subjected to disciplinary segregation and that he was punished for praying aloud in Arabic with a fellow inmate. We affirm the remainder of the district court's order, including the denial of Conner's cross-motion for summary judgment.

II.

A. State's Motion for Summary Judgment

1. Sovereign Immunity

The state correctly contends that the eleventh amendment bars Conner's suit against the State of Hawaii, *Hans*

[1] The named defendants are Theodore Sakai, Acting Administrator, Department of Institutions; Harold Falk, Director of Corrections; and several administrators of the Halawa Correctional Facility; Lawrence Shohet, Corrections Supervisor; William Oku, Administrator; Leonard Gonsalves, Chief of Security; Cinda Sandin and Francis Sequeira, Unit Team Managers; and seven Adult Corrections Officers (ACOs), William Summers, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshal, William Paaga, and Brian Lee.

v. Louisiana, 134 U.S. 1 (1890), 10 S. Ct. 504, *Quern v. Jordan*, 440 U.S. 332, 338-41, 99 S. Ct. 1139, 1143-45 (1979),[2] and Conner's suit against the other defendants in their official capacities, *Hafer v. Melo*, 112 S. Ct. 358, 362 (1991). However, the eleventh amendment does not bar Conner's suit against the other defendants in their personal capacities. *Id.* at 362.

2. Disciplinary Segregation

Conner contends that the disciplinary segregation imposed on him after a hearing on August 28, 1987, violated his right to due process. He asserts that, before the hearing, he was not given a summary of the facts leading to the charges, that he was not permitted to question the guard who charged him with the offense, that he was not allowed to call witnesses at the hearing, and that his testimony was "doctor[ed]" and used against him. We agree that Conner has presented a genuine issue of material fact as to whether his hearing comported with due process.

[1] The first issue we face is whether Conner had a liberty interest, protected by the fourteenth amendment, in not being arbitrarily placed in disciplinary segregation. The fourteenth amendment protects liberty interests arising from the Due Process Clause or created by state law. *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S. Ct. 864, 868-69

[2] Conner claims that the State has waived its immunity through Haw. Rev. Stat. § 662-2. However, this section waives the state's immunity only as to tort suits. Conner does not make out a tort claim.

(1983). To discover whether state law has created a liberty interest, we must "examine closely the language of the relevant statutes and regulations" to see whether the state has placed "substantive limitations on official discretion." *Kentucky Dep't of Corrections v. Thompson*, 109 S. Ct. 1904, 1909 (1989) (internal quotation omitted; citation omitted). Most commonly a state fetters official discretion by a two-step process. First, the state establishes "substantive predicates" to govern official decisionmaking. These are "particularized standards or criteria to guide the State's decisionmakers." *Id.* Next, the state requires, in "explicitly mandatory language," that if the substantive predicates are met, a particular outcome must follow. *Id.* at 1909-10. We conclude that Hawaii's regulations create a liberty interest in remaining free from disciplinary segregation. The regulations provide explicit standards that fetter official discretion. Under Title 17, subtitle 2 (Corrections Division), Department of Social Services and Housing, § 17-201-18(b) ("§ 17-201-18(b)"), the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt. If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome – freedom from disciplinary segregation – must follow. § 17-201-18(b).

Having found that Conner possessed a liberty interest in not being confined to disciplinary segregation, we now proceed to the issue whether he was afforded sufficient process before being so confined.

i. summary of facts

Under the Due Process Clause, an inmate facing a disciplinary hearing must be given advance notice of the hearing. *Wolff v. McDonnell*, 418 U.S. 539, 563-65, 94 S. Ct. 2963, 2978-79 (1974). Even if state administrative regulations supply additional process due to inmates of Hawaiian prisons, *see* § 17-300-3 *et seq.*,[3] and even if inmates may sue to enforce such regulations in federal court, there is no genuine issue of material fact as to whether Conner was given the opportunity to review the facts and other materials supporting the charge against him. The record contains a form, apparently signed and dated by Conner, that recites the charge against him and states, "Facts supporting the charge(s) are as stated on the attached Misconduct Report." Because Conner does not contest that he signed and dated the form or that the misconduct report was attached, and does not otherwise dispute the authenticity of the form, he has failed to show that a genuine issue of material fact exists as to this contention. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986); Fed. R. Civ. Pro. 56(c).

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[3] Section 17-201-16(c) requires that an inmate be given an opportunity to review all relevant non-confidential reports of misconduct or a summary of such reports between the time the inmate receives notice of the hearing and the hearing itself. Section 17-201-16(d) provides that the misconduct reports or summary "shall contain" a description of the specific rule alleged to have been violated, the facts that support the charge, and the names of witnesses.

ii. cross-examination

No genuine issue of material fact exists as to Conner's contention that he was not permitted to cross-examine the guard who charged him with misconduct. The Due Process Clause does not require prison administrators to afford inmates such a right. *Wolff v. McDonnell*, 418 U.S. at 567-69, 94 S. Ct. at 2980-81. Even if state regulations may be enforced in a case such as this, Hawaii has not created a due process right to cross-examine witnesses at a disciplinary hearing.[4]

iii. alteration of testimony

Conner has not raised a genuine issue of material fact to support his contention that his testimony at his hearing was doctored. His affidavits do not disclose the alterations allegedly made. Bare allegations do not suffice to

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[4] Under § 17-200-16(e), the prison may decline to permit the inmate to cross-examine witnesses at a disciplinary hearing. It states that the inmate "may" be given the opportunity to confront and cross-examine adverse witnesses unless, in the judgment of the disciplinary committee, such a confrontation would

(A) Subject the witnesses to potential reprisal;

(B) Jeopardize the security or good government of the facility;

(C) Be unduly hazardous to the facility's safety or correctional goals; or

(D) Otherwise reasonably appear to be impractical or unwarranted.

§ 17-200-16(e)(2). If the inmate is not permitted to confront or cross-examine adverse witnesses, the disciplinary committee "is encouraged" to record the reason for the denial and to explain the reason to the inmate. § 17-200-16(e)(3).

defeat a motion for summary judgment: Conner's obligation, rather, was to relate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2552.

iv. witnesses

[2] Under *Wolff v. McDonnell*, an inmate "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566, 94 S. Ct. at 2979. The state's regulations, even if applicable, do not expand on this right.[5] A genuine issue of material fact exists as to Conner's contention that he was not permitted to call witnesses at his hearing. The record contains a form, apparently distributed to Conner after the hearing, that states that witnesses were unavailable at the hearing "due to the move to the medium facility and being short staffed on the modules."

Prison disciplinary committees may not deny a defendant the right to call important witnesses solely for the sake of administrative efficiency. *Bostic v. Carlson*, 884 F.2d 1267, 1273 (9th Cir. 1989). Rather they must show the adequacy of their justification for denying a request to

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[5] The state's regulation's [sic] track *Wolff v. McDonnell*, *supra*, in stating that the inmate "should" be given the opportunity to call witnesses "as long as it will not be unduly hazardous to institutional safety or correctional goals." § 17-200-16(f)(1). Reasons for denial of such an opportunity are irrelevance, lack of necessity, the hazards presented in the individual case, and "any other justifiable reason." § 17-200-16(f)(2).

present witnesses in a disciplinary proceeding. *Id.* Further, we note that "[t]he security issues that concerned the *Wolff* Court were the risk of death or injury to inmate witnesses and informants identified at hearings or in produced documents, as well as the potential for breakdown in authority, order and discipline inside the institution." *Young v. Kann*, 926 F.2d 1396, 1400 & nn. 8, 9 (3d Cir. 1991). It is not clear that these were the concerns that motivated the disciplinary committee that considered Conner's case.

[3] In the context of a motion for summary judgment, the prison's burden to show the adequacy of its justification for denying an inmate the right to present witnesses at his hearing is the one it would bear in a motion for a judgment as a matter of law (directed verdict) under Fed. R. Civ. Pro. 50(a). *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S. Ct. at 2552. Such a burden requires that the evidence "permit[] only one reasonable conclusion as to the verdict." *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir. 1992), *cert. denied sub nom. Casares v. Spendthrift Farm, Inc.*, 113 S. Ct. 399 (1992). In stating without more that "witnesses were unavailable due to [the] move to the medium facility and being short staffed on the modules," the state has not met its affirmative burden.

Conner links only Defendant Sandin to the denial of his right to call witnesses.[6] The state claims that all of the

[6] In his affidavit of May 17, 1988, Conner states: "On August 28, 1987, Defendant Cinda Sandin did violate my right to due process when she denied me the right to question the correctional officer whom had written me up, and to review the submitted reports, and to call witnesses."

defendants, including Defendant Sandin, are protected by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2737 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S. Ct. 3034, 3039-40 (1987); *Erickson v. United States*, 976 F.2d 1299, 1301 (9th Cir. 1992). Under the doctrine of qualified immunity, the issue is whether the right infringed was clearly established at the time of the defendant's complained-of action, and whether a reasonable official could have believed that his or her actions did not violate that right. *Anderson v. Creighton*, 483 U.S. at 640-41, 107 S. Ct. at 3039-40. The right to call witnesses at a disciplinary hearing has been clearly established since *Wolff v. McDonnell* was decided in 1974. Whether a reasonable official could have believed his actions in denying Conner the requested witnesses were lawful is a matter that cannot be decided without a fuller development of the record.

Accordingly, summary judgment as to Conner's claim regarding disciplinary segregation is reversed with respect to Defendant Sandin.[7]

3. *Prayer in Arabic*

Conner alleges that his first and fourteenth amendment rights were violated when prison officials punished him for praying aloud in Arabic. He was punished for violating a prison rule that requires inmates to "communicate in the English language only; including telephone

[7] Conner also contends that no evidence supported the disciplinary committee's finding of guilt. However, he has not supported his contention with an affidavit or a verified complaint.

calls, visits, and letters." Conner contends that as a Muslim he must say his prayers in Arabic and that he must say them aloud; that on February 1, 1989, he was a recent convert to Islam and had only begun to learn Arabic; and that on that day he was praying aloud in Arabic in unison with a more experienced fellow inmate when Defendants Paaga and Lee ordered the two men to speak in English only. When Conner refused to comply, Defendant Paaga issued a misconduct report, which led to Conner's confinement in disciplinary segregation for fourteen days. In addition to Defendants Paaga and Lee, Conner seeks relief from Defendants Oku, Sakai, and Falk for the deprivation of due process he claims to have suffered.

[4] Construing the facts most favorably to Conner, as we must on a motion for summary judgment, *see Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988), we assume that Conner was punished after refusing to stop praying in Arabic.[8] It is a fundamental element of due process that conduct may be punished under a rule only if that rule proscribes the conduct. It seems clear that the prison's English-only rule does not apply to prayer. We believe that the plain meaning of the rule forbids the non-English interchange of information between or among humans, not between humans and their gods. If the rule were intended to apply to "communication" with divine beings, certainly the term "prayer" would have been

[8] The misconduct report states that Conner was punished for refusing to obey Defendant Paaga's order. However, because Defendant Paaga's order was to stop speaking in a foreign language, we consider whether, under the Due Process Clause, Conner may be punished for violating the underlying rule.

used. Nor do the examples provided in the rule – telephone calls, visits, and letters – suggest a more holy meaning.

[5] In addition, even if the interpretation of the rule could be stretched to include prayer, we would hold that the due process clause forbids the implementation of such a construction. The due process clause bars the state from imposing punishment on the basis of an unexpected and unusual interpretation of plain language. *See Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S. Ct. 1697, 1702 (1964). The language of the English-only rule on its face clearly proscribes only inter-personal communication, and the examples accompanying the rule reinforce such a reading. Had the state desired to proscribe praying aloud, language clearly proscribing such conduct could been [sic] included in the rule.[9] *See United States v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 1540 (1947) (upholding a law against a void-for-vagueness challenge because no "clearer and more precise language. . . . occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose"). The interpretation of the English-only rule sought by the state would be most unexpected and highly unusual. Therefore, the rule cannot be constitutionally applied to the conduct at issue here: it gives inmates insufficient notice that they are forbidden to pray in a foreign language.

[9] We indicate no view regarding the constitutionality of such a proscription.

Conner does not proximately connect Defendants Oku, Sakai, and Falk to the constitutional wrong he has suffered. Summary judgment was therefore appropriate as to these defendants. *Leer v. Murphy*, 844 F.2d at 633-34; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The state maintains that Defendants Paaga and Lee are immune from suit. It is true that government officials performing discretionary functions enjoy a qualified immunity insofar as their conduct does not violate statutory or constitutional rights of which a reasonable person should have known. *See Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S. Ct. at 2738. As indicated by our discussion above, we believe a reasonable official would have known that a regulation that forbids communication in a foreign language does not forbid prayer. Thus, the state cannot assert the defense of qualified immunity based on uncertainty in the law or the law's application to this case.

Nevertheless, Defendants Paaga and Lee may still be entitled to qualified immunity. The proper question is whether, at the time of the challenged conduct, a reasonable official would have understood that the actions of Defendants Paaga and Lee violated Conner's rights. *Anderson v. Creighton*, 483 U.S. at 640-41, 107 S. Ct. at 3039-40. Thus, if a reasonable official would not have realized that Conner was praying but could have thought that he was simply communicating with humans regarding earthly subjects, Defendants Paaga and Lee would be entitled to qualified immunity. On remand, the district court should consider whether Defendants Paaga and Lee are entitled to qualified immunity on this basis.

4. Denial of Access

[6] Conner has submitted affidavits alleging that certain defendants have deprived him of legal materials; however, he has failed to allege or offer evidence of "actual injury" with respect to court access as a result of these deprivations. When a claim of denial of access to the courts does not involve inadequate law libraries or inadequate legal assistance, actual injury must be alleged. *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). Summary judgment on this issue is therefore affirmed.

5. Review of Confinement

Conner argues by reference to *Sims v. Falk*, No. 88-0348-DAE (D. Ha. 1989), that he has been denied meaningful periodic review of his confinement in the maximum security portion of the prison.[10] However, his affidavit in support of his contention is conclusory. Without supporting facts, we are required to hold that summary judgment was properly granted on this issue.

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[10] The district court in *Sims*, assessing the same claim made against several of the same defendants (Falk, Oku, and Shobet) regarding the same portion of the same prison, held that such confinement was punitive rather than classificatory in nature, and issued a preliminary injunction that ordered the prison to review Sims' confinement not less than every thirty days and to permit Sims to meaningfully participate in the review. The complaint was later dismissed by stipulation.

6. Possession of Written Rules

Conner argues, again by reference to *Sims*, that due process entitles him to retain a copy of the written rules that set the standard against which inmates' behavior is judged within the prison. He states in an affidavit that he has not been given a copy of such rules. The prison contends that Conner has been furnished with a copy of the *Inmate Handbook*. A question of material fact thus exists as to this contention. However, Conner has not proximately connected any of the defendants to the loss he claims to have suffered. Therefore, his argument fails. *Leer v. Murphy*, 844 F.2d at 633-34; *Taylor v. List*, 880 F.2d at 1045.

7. Legal Status of the Segregation and Maximum Custody Program

Conner contends that the existence of the Segregation and Maximum Custody Program ("Program") has violated his right to due process because the Program was never correctly authorized by the Director of the Department of Social Services or the Governor of Hawaii. He asserts that § 17-200-1 and Haw. Rev. Stat. § 353-3 create a liberty interest in not being subject to any law not explicitly authorized by the governor, that the Program lacks the signatures required by the statute, and that without the signatures the Program does not have the force of law.[11]

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[11] Section 17-200-1 states:

> This subtitle shall govern the corrections division of the department of social services and housing, State of Hawaii. Each individual facility may adopt rules governing its unique situation pursuant to Chapter 353, subject to the approval of the director of the department of social services and housing and the governor.

The version of Haw.Rev.Stat. § 353-3 in effect when the Program was implemented provided that

> [t]he director of social services and housing . . . may make and from time to time alter or amend rules relating to the conduct and management of [the state correctional] facilities and the care, control, treatment, furlough and discipline of persons committed to his care, which rules must be approved by the governor. . . .

Whether or not the Program was approved by the director or the governor, and whether or not the conjunction of § 17-200-1 and Haw. Rev. Stat. § 353-3 creates a liberty interest, Conner's claim fails. The Program was implemented in 1981, according to an affidavit of Defendant Shohet, while § 17-200-1 did not become effective until October 6, 1983. Therefore, § 17-200-1 does not govern the Program and cannot create a liberty interest.

In addition, Conner appears to argue that the Program is invalid because it does not comply with the Hawaii Administrative Procedures Act. Conner's argument appears to make a state claim. Such claims are barred in § 1983 suits. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 919 (1984). Summary judgment on this issue is affirmed.

8. The Program as a Behavior Modification Program

Conner argues that the Program is invalid because its policy of providing privileges for good conduct is a behavior modification program of the type rejected in *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), *as amended*, 562 F. Supp. 106, *aff'd*, 875 F.2d 862 (6th Cir. 1989), *cert denied*, 493 U.S. 991, 110 S. Ct. 539 (1989). *Canterino* was decided under an eighth amendment theory. Construing Conner's complaint and affidavits liberally, *see Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972), *United States v. Bigman*, 906 F.2d at 395, we conclude that Conner contends that the prison's behavior modification program is so unnecessarily restrictive as to constitute cruel and unusual punishment.[12]

Conner alleges that Defendants Falk, Sakai, Oku, and Shohet are responsible for deprivation he contends he has

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[12] In his affidavit of March 6, 1989, Conner states that the most restrictive non-disciplinary confinement within the Program is virtually identical to disciplinary segregation, *see Canterino*, 546 F. Supp. at 184; that an inmate is permitted to move to a less restrictive environment only after completing a set number of days free of misconduct and that a single act of misconduct erases all the accumulated days and forces an inmate to begin at the beginning, *see id.* at 187; that the Program, as administered, leaves Conner "edgy often, argumentative, and frustrative," *see id.* at 184, 186; and that no written criteria are made available to him so that he will know what behavior is required in order to move to less restrictive environments, *see id.* at 187. In his affidavit of December 26, 1989, he alleges that, while he is confined in the most restrictive prison environments, he is denied periodic reviews of his confinement; allowed inadequate exercise time; and denied permission both to receive newspaper articles, brochures, books, and magazines through the mail, and to contest the rulings of those who censor his mail.

suffered. His contention fails as to Defendant Falk because his affidavit is made on information and belief, not on the personal knowledge required by Fed. R. Civ. Pro. 56(e). *See Taylor v. List*, 880 F.2d at 1045 n.3. His claim fails as to Defendants Sakai, Oku, and Shohet because he neglects to set forth facts that proximately connect them with the constitutional injury he contends they inflicted. *Id.* at 1045; *Leer v. Murphy*, 844 F.2d at 633-34.[13]

Additionally, Conner asserts that the Program violates Haw. Rev. Stat. § 465(2), which requires those who practice psychology to be licensed. Such a contention presents a state law claim, which is barred under *Pennhurst*, 465 U.S. at 121, 104 S. Ct. at 919.

9. 106 Minor Misconduct Warnings

Conner claims that he was harassed by prison officials through numerous 106 warnings. These are written citations that in themselves lead to no disciplinary action but the accumulation of which may lead to disciplinary segregation.

Even if such warnings infringe on a protected liberty interest, there is no constitutional violation unless and until the inmate is placed in disciplinary segregation as a

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[13] Conner claims, for example, in an affidavit dated December 26, 1989, that Defendants Oku and Shohet "are liable for depriving [him] of adequate exercise and recreation when they subject [him] to 22 hours of punitive isolation." Assuming without deciding that twenty-two hours of punitive isolation constitutes cruel and unusual punishment, Conner's contention lacks the specificity necessary to defeat a motion for summary judgment.

result of the accumulated warnings. Conner has not set forth any facts that indicate that the warnings he received resulted in any punishment. Therefore, he has failed to support this claim.

10. Retaliation Claim

Finally, Conner contends that the defendants have retaliated against him for his activities as a jailhouse lawyer. However, none of his allegations is supported by an affidavit or verified complaint. Summary judgment on this issue is therefore affirmed.

B. Conner's Cross-Motion for Summary Judgment

The foregoing discussion makes clear that the only issues on which Conner might be entitled to summary judgment are disciplinary segregation and prayer in Arabic. The state has presented genuine issues of material fact as to both these claims. The district court's denial of Conner's cross-motion for summary judgment is therefore affirmed.

III.

The district court's grant of the defendants' motion for summary judgment is reversed on the following issues: the disciplinary segregation claim as to Defendant Sandin; and the prayer claim as to Defendants Paaga and Lee. Summary judgment is upheld on all other claims and as to all other defendants. The district court's denial of Conner's motion for summary judgment is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX "B"

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-16704
CT/AG#: CV-88-00169-ACK

DEMONT R.D. CONNER

Plaintiff - Appellant

v.

THEODORE SAKAI, et. al.

Defendant - Appellee

(MANDATE ISSUED
Mar. 25, 1994)

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part, REVERSED in part, and REMANDED.

Filed and entered February 2, 1994

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

DEMONT R.D. CONNER, Plaintiff, vs. THEODORE SAKAI, et al., Defendants.	)	CIV. NO. 88-0169 ACK

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 30, 1991)

I. INTRODUCTION

On May 20, 1991, the Magistrate entered a report and recommendation (R & R) wherein it was recommended that this court grant defendants' motion for summary judgment, deny plaintiff's motion for summary judgment, and dismiss the complaint with prejudice. On June 18, 1991, plaintiff filed his objections to the R & R.

For the following reasons, the court adopts the R & R.

II. FACTS

Plaintiff is an inmate at Halawa High Security Facility (HHSF). Plaintiff filed a pro se complaint in 1986 alleging violations of his rights under 28 U.S.C. § 1983.

The complaint was thereafter amended twice, the last amendment occurring on September 8, 1989.

In the current amended complaint, plaintiff alleges that his constitutional rights were being violated under 28 U.S.C. §§ 1983, 1985(3), and 1986. Plaintiff seeks a declaratory judgment, injunctive relief, and money damages. All defendants are officials of the state's prison system and are sued in their official and individual capacities.

The complaint alleges violations of plaintiff's First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. In addition, the complaint alleges that plaintiff's rights under the Hawaii state constitution were violated. In particular, plaintiff makes the following claims in his complaint:

(1) defendants impermissibly subjected plaintiff to a behavior modification program that was invalid under state law;

(2) defendants subjected plaintiff to punitive isolation pursuant to the behavior modification program without due process of law, and in violation of state law;

(3) defendants denied plaintiff adequate exercise and recreation in violation of state law and the Eighth Amendment;

(4) defendants' strip-search policy violated plaintiff's right to privacy;

(5) defendants used "#106 Minor Misconduct" forms against plaintiff in violation of due process of law;

(6) defendants were deliberately indifferent to plaintiff's (and all inmates') medical needs;

(7) defendants violated plaintiff's free exercise rights to religion;

(8) defendants' "blanket policy" regarding items plaintiff could receive through the mail violated plaintiff's rights;

(9) defendants violated plaintiff's freedom of association and expression rights by way of defendants' "publishers only" rule, and defendants' rule requiring plaintiff to first donate the publication to the state;

(10) defendants subjected plaintiff to excessively long periods of punitive confinement in dehumanizing "strip-cells;"

(11) defendants subjected plaintiff to "double-celling" in inadequately lighted cells for 17 hours per day;

(12) defendants subjected plaintiff to retribution for his activities as a jail-house lawyer;

(13) defendant's "English-only" rule violated plaintiff's rights to freedom of expression, speech, religion and association;

(14) defendants violated plaintiff's Eighth Amendment rights by denying him psychological and psychiatric treatment while he was in the behavior modification program; and

(15) defendants denied plaintiff his state-created liberty interests in participating in educational, vocational, and counseling programs that are mandated by state law.

Defendants moved for summary judgment. Plaintiff filed a cross-motion for summary judgment. The Magistrate's R & R recommended that defendants' motion be

granted, and that plaintiff's motion be denied. In addition, the Magistrate recommended that the complaint be dismissed with prejudice.

III. DISCUSSION

A. Standard of Review

Any party may file objections to a R & R by filing the same within 10 days of service of the R & R. Local Rule 404-2. This court "shall make a de novo determination of those portions of the [R & R] to which objection is made. . . . " *Id.* (bold in original).

B. The Merits

The R & R was served on May 21, 1991. Pursuant to Fed.R.Civ.P. 6(a), the parties had until June 5, 1991 to file objections. Defendants filed no objections. Plaintiff filed a motion to extend the time within which to file objections. The motion was filed May 31, 1991 and requested that plaintiff be granted leave to "submit his objections within . . . the week of June 10, 1991." This court partially granted the motion, giving plaintiff until June 10, 1991 to file his objections. Plaintiff's objections were filed on June 18, 1991, although the objections were signed and dated by plaintiff on June 6, 1991.

The court is somewhat puzzled by the late filing date of plaintiff's objections in that they are dated some 12 days beforehand. Nonetheless, the court will consider the objections as timely filed because of the latitude that must be afforded pro se litigants.

1. Order Partially Granting Extension to File Objections

Plaintiff objects to the order partially granting plaintiff an extension of time to file his objections. Plaintiff complains that the court should have granted plaintiff more time in which to have objected. Plaintiff bases this assertion on the grounds that he needed additional time because of his limited access to the law library. In addition, plaintiff asserts that he needed additional time because of time pressures exerted by other cases he has filed. Plaintiff also claims he needed additional time because of his pro se status and lack of education.

The court rejects plaintiff's contention that it should have granted him additional time. The Local Rules of this court and the United States Code explicitly state that objections are to be served within 10 days of the R & R. 28 U.S.C. § 636(b)(1)(C); Local Rule 404-2. Thus, the court was under no obligation to extend that time period. Nonetheless, the court gratuitously extended the deadline. In the motion requesting additional time, plaintiff's only stated reason for the request was the fact that he has many lawsuits he has filed which also require his attention. Under the circumstances, the court's extension was not unreasonable. Furthermore, the court notes that plaintiff's contention that his lack of education and his status as a non-lawyer hindered his ability to respond quickly is unconvincing. Plaintiff has amply demonstrated, through his various lawsuits filed in this district, that he is very familiar with the legal system and possesses enough education to confidently and quickly maneuver within the system.

2. The R & R

Plaintiff acknowledges that the R & R is correct insofar as it found that he conceded his claims relating to strip-searches and mechanical restraints. Objections, at 12. Moreover, plaintiff concedes that he does not assert a claim for his "placement" in HHSF's "Segregation and Maximum Control Program" (SMCP). Therefore, with the exception of the above-mentioned issues (strip-searches, mechanical restraints, and any claim that can be construed as a claim of violation of rights relating to plaintiff's placement in SMCP) the court will proceed to address each issue raised by the R & R.

a. Summary Judgment Standard

Plaintiff objects to the Magistrate's summary judgment standard on page 3 of the R & R. This court has reviewed the standard on page 3 of the R & R and concludes that though it is less descriptive than the court would prefer, it is accurate and adequate. Therefore, the court rejects plaintiff's objection on this point.

b. Invalid Rule

Plaintiff objects to the Magistrate's characterization of plaintiff's claims relating to placement in the behavior control program, SMCP. Plaintiff states that he does not contest his placement in the program. Rather, plaintiff contends SMCP is an invalid "rule" to which he should not have been subjected. Moreover, plaintiff claims that

the "invalid rule" violates his rights. For the following reasons, the court rejects this contention.

The SMCP was instituted in 1981. *See* Shohet's affidavit (attached as exhibit E to plaintiff's opposition to defendants' motion for summary judgment filed January 8, 1990). It is an inmate behavior program wherein inmates demonstrating satisfactory behavior gain greater privileges and advance to more favorable levels of the program. *Id.* SMCP was "geared to the security needs of a high security facility," i.e., HHSF. *Id.* ¶ 4, at 2. SMCP was not approved by either the director of the department of social services and housing, or the governor of the state of Hawaii.

Plaintiff claims the SMCP is an invalid rule because SMCP governs the HHSF facility, and neither the director of the Department and Social Services and Housing (DSSH) nor the governor approved SMCP. This, plaintiff contends was a violation of DSSH Rule 17-200-1, Title 17.

DSSH Rule 17-200-1 provides:

> This subtitle shall govern the corrections division of the department of social services and housing, State of Hawaii. Each *individual facility* may adopt rules governing its unique situation pursuant to Chapter 353,[1] *subject to the approval*

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[1] The version of HR.S. § 353-3 in effect in 1981 when the SMCP was implemented provided that

> [t]he director of social services and housing . . . may make and from time to time alter or amend rules relating to the conduct and management of [the state correctional] facilities and the care, control treatment, furlough and discipline of persons committed to his

> *of the director of the department of social services and housing and the governor.* However, suppression of these rules shall be permitted only where necessary due to the unique characteristics of the facility.

(emphasis added).

SMCP affects the individual "facility" of HHSF. *See* Shohet's affidavit ¶ 4, at 2 (attached as exhibit E to plaintiff's opposition to defendants' motion for summary judgment filed January 8, 1990). Moreover, SMCP was not approved by the director or the governor. Plaintiff cites to *Wilder v. Tanouye*, 753 P.2d 816 (Haw.App. 1988) to indicate that SMCP is an invalid rule.[2]

Wilder held that Rule 17-200-1 "applie[s] only to rules governing a 'facility'. . . . " 753 P.2d at 824. As noted above, SMCP governs HHSF. *Wilder* also held that former H.R.S. § 353-1.2 provided for the establishment of a high security correctional facility. *Id.* Presumably, HHSF is that facility. Rule 17-200-1 would indicate that SMCP should have been approved by the director and governor in order to be valid.

However, this is not the case. Rule 17-200-1 became effective on October 6, 1983 while SMCP was implemented in 1981. *Compare* Shohet affidavit and Title 17,

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> care, which rules must be approved by the governor. . . .

[2] Plaintiff does not attempt to argue that H.R.S. § 353-3 renders SMCP an invalid rule. Such argument would be meritless because SMCP is applied only to HHSF, and the requirement of 353-3 apply only to rules affecting "correctional facilities . . . on a statewide basis." *Wilder*, 752 P.2d at 824.

Rule 17-200-1 (copy attached to plaintiff's opposition to defendant's motion filed January 8, 1990). Thus, SMCP, when it was implemented, was not subject to Rule 17-100-1 because Rule 17-200-1 did not exist then. Therefore, Rule 17-200-1 is inapplicable to SMCP. SMCP is not an invalid rule.

Plaintiff also argues that SMCP is invalid because it fails to comply to the Hawaii Administrative Procedures Act (HAPA). Plaintiff appears to concede that HAPA is inapplicable to regulations concerning only the internal management of HHSF. *See* objections, at 5; *Tai v. Chang*, 58 Haw. 386, 387 (1977) ("Under HAPA, the term rule is defined to exclude "regulations concerning only the internal management of an agency."). However, plaintiff appears to contend that SMCP is not an internal management regulation. Plaintiff cites to the "Inmate Guidelines" as an example of internal management regulations exempt from HAPA, and argues that the SMCP is vastly different from the guidelines, and therefore, not an internal management regulation.

The court rejects this argument. The court has reviewed plaintiff's exhibits regarding SMCP and concludes that SMCP is an internal management regulation. SMCP is "geared to the security needs of a high security facility" such as HHSF. Shohet affidavit. Security needs are:

> matters relating to the operation and management of state and county penal . . . institutions . . . [and are] primarily a matter of "internal management" [thus] excluded from . . . [HAPA].

House Standing Committee Report No. 8 (1961).

Since SMCP is not an invalid rule, all of plaintiff's objections and claims based on his contention that he has a state-created liberty interest in being free from an invalid rule fail. There is no "invalid" rule upon which to base the state-created liberty interest.[3]

c. Cruel and Unusual Punishment

Plaintiff objects to the Magistrate's finding that plaintiff's placement in HHSF was not cruel and unusual punishment. Plaintiff claims this issue was not raised by either party in their motions for summary judgment. Alternatively, plaintiff claims that placement in HHSF is punishment and cites to an opinion by Judge Ezra for support. *See Sims v. Falk*, Civil No. 88-348 DAE (Jan. 4, 1989).

Plaintiff's first objection that the issue was not raised by the parties is without merit. Defendants squarely raised the issue in their motion for summary judgment. *See* defendants' motion, at 7-8.

In addition, as the R & R correctly notes, plaintiff's placement within HHSF is reasonably related to the prison system's legitimate goal of maintaining institutional security and discipline. HHSF was designed to house inmates who attempted escape attempts, assaults, etc. Plaintiff was at HHSF for such reasons. Prior to his incarceration at HHSF, plaintiff attempted to escape. This

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[3] The court assumes but expressly notes that it does not decide whether plaintiff has a state-created liberty interest in being free from an invalid rule under the Hawaii statutes.

resulted in his conviction for attempted escape in the second degree on April 4, 1984. In addition to attempting escape, Plaintiff has committed such misconduct as assault, attempted assault on other inmates, and harassment and abuse of staff personnel. As a result of his predicated behavior, Plaintiff, considered a high custodial risk inmate, is incarcerated at HHSF which is, of necessity, the most restrictive prison in the state system. Plaintiff does not dispute or contest the reasons necessitating his actual transfer to HHSF.[4]

Based on the foregoing, the court rejects plaintiff's claim that placement in HHSF is punishment within the meaning of the Eighth Amendment.

d. Inmate Communication

Plaintiff objects to the R & R insofar as it recommends summary judgment in favor of defendants on the issue of the "English only" rule. Plaintiff claims it infringes on his free exercise of religion rights.

The rule prohibits inmates from conversing with each other in any language except English. Defendants contend that the rule is necessary to prevent entry of contraband, and checking for rumors of plans of escape,

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[4] Plaintiff concedes and admits, "Plaintiff does not challenge his transfer and placement 'at and within the Halawa High Security Facility,' as it is obviously apparent from Plaintiff's institutional filed and from his criminal convictions that the high security facility is a proper place for inmates who pose such a threat to the community and to the prison environment." Opposition Memorandum at 4.

extortion, or of fights within the facility. Allowing such communication, defendants contend, would undermine prison security.

The rule states that "[i]nmates shall communicate in the English language only; including telephone calls, visits, and letters."

The U.S. Supreme Court has repeatedly held that prison regulations alleged to infringe constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. *O'Lone v. Estate of Shabazz*, 482 U.S. 340, 347, 107 S.Ct. 2400, 2404 (1987); *Turner v. Safley*, 482 U.S. 78, 86-87, 107 S.Ct. 2254, 2260-2261 (1987); *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886 (1979). When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is "reasoanbly related to legitimate penological interests." *O'Lone*, 482 U.S. at 347, 107 S.Ct. at 2404, (citing *Turner v. Safley*, 482 U.S. at 89, 107 S.Ct. at 2261). Moreover, the Supreme Court in *O'Lone* further articulated that a separate burden should not be placed on state prison officials to prove that "no reasonable method existed by which prisoners' religious rights could be accommodated without creating bona fide security problems." *Id.*, 482 U.S. at 351, 107 S.Ct. at 2405. Although the availability of alternatives is relevant to the reasonableness inquiry, the Supreme Court rejected the notion that "prison officials have to set up every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.*

This court finds that the regulation prohibiting Plaintiff from praying aloud in Arabic *together* with another inmate is valid as it is "reasonably related to legitimate penological interests." Being enforced for reasons pertaining to security interests, the regulation does not arbitrarily infringe upon Plaintiff's constitutional rights. Moreover, in *Johnson v. Moore*, 926 F.2d 921, 923 (9th Cir. 1991), the Ninth Circuit held that "[p]risons need only provide inmates a 'reasonable opportunity' to worship in accord with their conscience."

The regulation does not prohibit plaintiff from *individually* praying aloud in Arabic, or from praying with another inmate in English. Plaintiff has not asserted that praying aloud together with another individual *in Arabic* is a necessary and fundamental tenet of his religion. Cinda Sandin, Residency Section Supervisor at Halawa High Security Facility, attested that "Conner may pray quietly as required by his Muslim faith." (*See* affidavit of Cinda Sandin attached to Defendants' Motion for Summary Judgment filed November 20, 1989 at 4).

Thus, the "English-only" rule affords plaintiff a reasonable opportunity to worship pursuant to the *Johnson* test.

Plaintiff cites to the four-part test for determining whether a prison regulation is reasonably related to a legitimate penological interest in *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-62 (1987) for support of his contention that the "English-only" violates his rights to freedom of religion. The elements of the test are:

(1) whether there is a valid, rational connection between the regulation and a legitimate and neutral government interest;

(2) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates;

(3) whether and the extent to which the accommodation of the asserted right will impact the prison staff, inmates' liberty and prison resources; and

(4) whether the regulation represents an exaggerated response to prison concerns in light of the ready availability of alternatives.

Johnson, 926 F.2d at 924 (citing *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-62 (1987)). However, as pointed out in *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990), "[b]efore the *Turner* factors are applied to a prisoner's free exercise claim, the inmate must first establish the existence of a sincerely held religious belief, and that the challenged regulation infringes upon that belief."

As noted above, plaintiff has not established that praying *in Arabic* infringes upon the practice of his Muslim beliefs. Plaintiff is free to pray individually in Arabic, or jointly with other inmates in English. Plaintiff has not established that praying in Arabic is a tenet of the Muslim religion, and therefore such a prohibition does not infringe upon his beliefs.

The court rejects plaintiff's objection to the R & R on this issue.

e. Retaliation Claim

Plaintiff objects to the R & R insofar as it recommends granting defendants' motion and insofar as it holds that plaintiff's retaliation claim is vague and conclusory. Plaintiff claims he was retaliated against because of his status as a "jail-house lawyer." Plaintiff claims that his First Amendment rights are implicated. Objections, at 20 (citing *Bridges v. Russell*, 757 F.2d 1155 (11th Cir. 1985)). The gist of plaintiff's claim appears to be that defendants retaliate against plaintiff because plaintiff exercises his freedom of speech rights by being a jail-house lawyer. Plaintiff frames the issues as follows: Were "the actions of the named defendants done for the purpose of retaliating against plaintiff because of his choice to exercise his right to seek redress from government?" *Id.*

In connection with this claim, plaintiff takes exception to the Magistrate's finding that plaintiff's claim that he "held a virtual positive behavior since his arrival" at HHSF was false. Plaintiff points to his record at HHSF which indicates that he was cited for negative behavior only once. However, plaintiff, in his affidavit attached to his motion opposing defendants' motion states that he has accumulated "a collection of misconduct" while at HHSF. Conner affidavit ¶ 21.

Plaintiff claims that his record demonstrates good behavior. Even so, plaintiff claims he was denied advancement to more favorable phases of SMCP because of his jail-house lawyering. Plaintiff *"believes he would be able to show* that his record in H.H.S.F. . . . was better than those inmates who were advanced to the next higher level of" SMCP. Objection's [sic], at 24. However, plaintiff

provided no evidence substantiating this claim. He concedes that at this time he is not prepared to defend defendants' motion on this issue. *Id.*

Plaintiff attributes this dearth of evidence to the fact that he allegedly received no discovery. Plaintiff also requests additional time for discovery based on the "complexity" of this issue. However, the record indicates otherwise. Defendants were ordered by the Magistrate on November 7, 1989 to file responses to plaintiff's interrogatories by November 27, 1989. Defendants' motion for summary judgment was not filed until November 20, 1989. After defendants' filing, the record is devoid of evidence indicating that plaintiff requested or was denied discovery. Plaintiff has produced no evidence indicating that he was deprived of discovery.

The court rejects plaintiff's objections. Plaintiff filed the lawsuit on March 14, 1988. Defendants' motion for summary judgment was filed on November 20, 1989. Plaintiff had until January 2, 1990 to respond to the motion. There was an abundance of time for plaintiff to conduct discovery. As plaintiff admits, he has provided no evidence supporting his retaliation claims. Therefore, the court adopts the Magistrate's recommendation and grants summary judgment to defendants on this issue.

f. "Every Other Issue"

Plaintiff includes a "catch-all" provision where he objects to every remaining issue that the Magistrate recommends be decided in defendants' favor. Plaintiff provides no support for this objection. Rather, he complains

that he had insufficient time to prepare an adequate objection.

As noted previously, the court rejects plaintiff's claim regarding the amount of time this court granted plaintiff in which to file his objections. Therefore, this reason for failing to prepare a substantive objection to the remaining issues presented in the R & R is rejected. Moreover, upon review of the remaining issues, the court adopts the R & R and rejects the catch-all objection.

The court notes that with respect to the publishers-only rule, that such a rule is not per se reasonable because of *Bell v. Wolfish*, 441 U.S. 520 (1979), which held that such rules were constitutional. *See Johnson*, 926 F.2d at 923-25. However, in this case, the evidence indicates that plaintiff was entitled to order "hard-cover" books from publishers as well as from the library, and that the plaintiff is not required to donate the books to the state. Plaintiff has provided no evidence to prove he is being deprived of literature.

In addition, the court adds the following regarding the R & R's discussion of sovereign immunity. The defendants are not immune under the Eleventh Amendment to the extent plaintiff seeks to sue them in their official capacities for prospective injunctive relief.

In all other respects the court adopts the R & R, as plaintiff either has not produced evidence to substantiate such claims or has failed to argue the merits.

g. Issues Not raised in Summary Judgment

Plaintiff claims that there are other claims in this lawsuit that have not been disposed of by way of the motions. The court rejects this argument. Plaintiff was put on notice by defendants' motion that defendants sought to dispose of the entire lawsuit. For example, defendants stated that they sought "Summary Judgment in their favor in the above-entitled *action* on the ground that defendants are entitled to judgment in their favor as a matter of law." Defendants, Motion, cover page (emphasis added); *id.* at 20 ("The complaint should accordingly be dismissed.").

IV. CONCLUSION

Based upon the foregoing reasons, this court adopts the R & R granting defendants' motion for summary judgment, denying plaintiff's cross motion for summary judgment, and dismissing the complaint with prejudice.

DATED: Honolulu, Hawaii, SEP 30 1991.

/s/ Alan C. Kay
United States District Judge

DeMont R.D Conner v. Theodore Sakai, et al.; Civil No. 88-0169 ACK; Order Adopting Magistrate's Report and Recommendation Granting Defendants' Motion for Summary Judgment.

APPENDIX "D"

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

DEMONT RAPAHEL [sic] DARWIN CONNER	JUDGMENT IN A CIVIL CASE
V.	CASE NUMBER:
THEODORE SAKAI, et al	CIVIL 88-00169 ACK

(Filed Sept. 30, 1991)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the court adopts the Report and Recommendation granting Defendants' motion for summary judgment, denying Plaintiff's cross motion for summary judgment, and dismissing the complaint with prejudice.

September 30, 1991	/s/ Walter A.Y.H. Chinn
Date	*Clerk* WALTER A.Y.H. CHINN
cc: all parties	
	(By) Deputy Clerk

APPENDIX "E"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DeMont R.D. Conner, Plaintiff-Appellant, v. Theodore Sakai et al., Defendants-Appellees.	)	No. 91-16704 D.C. No. 88-0169-ACK ORDER (Filed Feb. 25, 1994

Before: BROWNING, NORRIS, AND REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "F"

(Seal)

STATE OF HAWAII

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

TITLE 17, ADMINISTRATIVE RULES OF THE CORRECTIONS DIVISION

INMATE HANDBOOK

OCTOBER 1983

[MATERIAL DELETED]

SUBCHAPTER 2
THE ADJUSTMENT PROCESS

§17-201-4 *General provisions.* The adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-5 *Rights, privileges, and responsibilities.* (a) The rights and privileges of all inmates and wards shall be as follows:

(1) You may expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.

(2) You shall be informed of the rules, procedures, and schedules concerning the operation of the institution.

(3) You have the right to freedom of religious affiliation, and voluntary religious worship.

(4) You will be provided health care which includes nutritious meals, proper bedding and clothing, a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation, regular exercise period, toilet articles, and medical and dental treatment.

(5) You may reasonably correspond and visit with family members, friends, and other persons according to the rules and schedules of the facility where there is no threat to security, order, or correctional programming.

(6) You may have access to the courts by correspondence on matters such as the legality of your conviction, pending criminal cases, or the conditions of your confinement.

(7) You may utilize reading material for educational purposes and for your own enjoyment.

(8) You have the right to participate in counseling, education, vocational training, employment, and other programs as far as resources are available and in keeping with your interests, needs, and abilities.

(b) The responsibilities of all inmates and wards shall be as follows:

(1) You have the responsibility to treat others respectfully, impartially, and fairly.

(2) You have the responsibility to know and abide by the rules, procedures, and schedules concerning the operation of the institution.

(3) You have the responsibility to recognize, respect, and not interfere with the rights of others.

(4) It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.

(5) It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.

(6) You have the responsibility to present to the court honestly and fairly your petitions, questions, and problems.

(7) It is your responsibility to seek and utilize reading materials for personal benefit, without depriving others of their equal right to the use of this material.

(8) You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3 (Imp: HRS §353-3)

§17-201-6 *Prohibited acts within institutions of the division; greatest misconduct category.* (a) Acts constituting misconduct of the greatest category shall be as follows:

(1) Sexual assault.

(2) Killing.

(3) Assaulting any person, with or without a dangerous instrument, causing bodily injury.

(4) The use of force on or threats to a correctional worker or the worker's family.

(5) Escape:

(A) From closed confinement, with or without threat of violence;

(B) From an open facility or program involving the use of violence or threat of violence.

(6) Setting a fire.

(7) Destroying, altering, or damaging government property or the property of another person resulting in damage of $1,000 or more, including irreplaceable documents.

(8) Adulteration of any food or drink which does or could result in serious bodily injury or death.

(9) Possession or introduction of an explosive or ammunition.

(10) Possession or introduction of any firearm, weapon, sharpened instrument, knife, or other dangerous instrument.

(11) Rioting.

(12) Encouraging others to riot.

(13) The use of force or violence resulting in the obstruction, hindrance, or impairment

of the performance of a correctional function by a public servant.

(14) Any lesser and reasonably included offense of the acts in paragraph (1) to (13).

(15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to sixty days.

(2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-7 *Prohibited acts; high misconduct category.* (a) Acts constituting misconduct of high category shall be as follows:

(1) Fighting with another person.

(2) Threatening another person, other than a correctional worker, with bodily harm, or with any offense against the other person or the other person's property.

(3) Extortion, blackmail, protection: demanding or receiving anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.

(4) Assaulting any person without weapon or dangerous instrument.

(5) Escape from an open institution or program, conditional release center, or work

release furlough which does not involve the use or threat of violence.

(6) Attempting or planning escape.

(7) Destroying, altering, or damaging government property or the property of another person resulting in damages between $500-$999.99.

(8) Tampering with or blocking any locking device.

(9) Adulteration of any food or drink which could or does result in bodily injury or sickness.

(10) Possession of an unauthorized tool.

(11) Possession or introduction or use of any narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff.

(12) Possession of any staff member's clothing or equipment.

(13) Encouraging or inciting others to refuse to work or to participate in work stoppage.

(14) The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.

(15) Giving or offering any public official or staff member a bribe.

(16) Any lesser and reasonably included offense of paragraphs (1) to (15).

(17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to thirty days.

(2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-8 *Prohibited acts; moderate misconduct category.* (a) Acts constituting misconduct of moderate category shall be as follows:

(1) Engaging in sexual acts.

(2) Making sexual proposals or threats to another.

(3) Indecent exposure.

(4) Wearing a disguise or a mask.

(5) Destroying, altering, or damaging government property or the property of another person resulting in damages between $50-$499.99.

(6) Theft.

(7) Misuse of authorized medication.

(8) Possession of unauthorized money or currency.

(9) Loaning of property or anything of value for profit or increased return.

(10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.

(11) Refusing to obey an order of any staff member.

(12) Violating a condition of any community release or furlough program.

(13) Unexcused absence from work, or other authorized assignment.

(14) Failing to perform work as instructed by a staff member.

(15) Lying or providing false statements, information, or documents to a staff member, government official, or member of the public.

(16) Counterfeiting, or unauthorized reproduction of any document, article, or identification, money, security, or official paper.

(17) Participating in an unauthorized meeting or gathering.

(18) Being in an unauthorized area.

(19) Failure to follow safety or sanitary rules.

(20) Using any equipment or machinery which is not specifically authorized.

(21) Using any equipment or machinery contrary to instructions or posted safety standards.

(22) Failing to stand count.

(23) Interfering with the taking count.

(24) Making intoxicants or alcoholic beverage.

(25) Being intoxicated.

(26) Gambling.

(27) Preparing or conducting a gambling pool.

(28) Possession of gambling paraphernalia.

(29) Being unsanitary or untidy; failing to keep one's person and one's quarters in accordance with posted safety standards.

(30) Unauthorized contacts with the public or other inmates.

(31) Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or ward's family, or friend.

(32) Any lesser and reasonably included offense of paragraphs (1) to (31).

(33) Any other criminal act which the Hawaii Penal Code classifies as a class C felony and misdemeanor.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to fourteen days.

(2) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-9 *Prohibited acts; low moderate misconduct category.* (a) Acts constituting misconduct of low moderate category shall be as follows:

(1) Destroying, altering, or damaging government property, or the property of another person resulting in damage less than $50.

(2) Possession of property belonging to another person.

(3) Possessing unauthorized clothing.

(4) Malingering, feigning an illness.

(5) Using abusive or obscene language to a staff member.

(6) Smoking where prohibited.

(7) Tattooing or self mutilation.

(8) Unauthorized use of mail or telephone.

(9) Correspondence or conduct with a visitor in violation of rules.

(10) Any lesser and reasonably included offense of paragraphs (1) to (9).

(11) Any other criminal act which the Hawaii Penal Code classifies as a petty misdemeanor.

(12) Harassment of employees.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to four hours in cell.

(2) Monetary restitution.

(3) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-10 *Prohibited acts; minor misconduct category.* (a) Acts constituting misconduct of minor category shall

be any criminal act which the Hawaii Penal Code classifies as a violation.

(b) Sanctions which may be imposed as punishment for acts in subsection (a) shall include one or more of the following:

(1) Loss of privileges (i.e., community recreation; commissary; snacks; cigarettes, smoking; personal visits – no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days).

(2) Impound inmate's personal property.

(3) Extra duty.

(4) Reprimand.

(c) Attempting to commit any of the above acts, aiding another person to commit any of the above acts, and conspiring to commit any of the above acts shall be considered the same as a commission of the act itself. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-11 *Minor misconduct; Adjustments.* (a) A minor rule violation is defined as that which poses no serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution or subjects the individual to the imposition of lesser penalties. Such misconduct may be punished by a staff member designated by the facility administrator who did not make the charge against the inmate or ward. The staff member shall inform the inmate or ward that the individual is accused of committing a minor infraction, to which the individual shall be given a brief opportunity to respond, to offer an explanation in defense, or otherwise show that

the individual is not guilty of the alleged misconduct. The following sanctions may be imposed:

(1) Loss of privileges; e.g., community recreation; commissary; snacks, cigarettes; smoking; personal visits no longer than fifteen days; personal correspondence no longer than fifteen days; personal phone calls.

(2) Impound inmate's or ward's personal property.

(3) Extra duty.

(4) Reprimand.

(b) The officer shall prepare a brief written report to be given to and placed in the individual's file, indicating the infraction, the sanction, and the date or dates the sanction is to be or was carried out. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-12 *Serious misconduct.* A serious rule violation is defined as that which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours. Such misconduct shall be punished through the adjustment committee pursuant to the procedures in sections 17-201-13 to 17-201-20. [Eff. Oct. 6, 1983] (auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-13 *Adjustment committee.* The adjustment committee shall be normally composed of at least three members who are not actually biased against the inmate or ward. A small facility may designate one person to act

in the capacity of the adjustment committee. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-14 *Pre-hearing detention.* An inmate or ward may be detained for a reasonable time pending an adjustment committee hearing if, in the judgment of the facility administrator, detention is necessary:

(1) To protect life or limb;

(2) For the security or good government of the facility;

(3) To protect the community;

(4) For any other good reason. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-15 *Pre-hearing investigation.* (a) A staff member may conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate or ward committed misconduct. If the staff member finds sufficient cause to believe that a rule violation has occurred, the adjudication procedures may be initiated. Additionally, the pre-hearing investigator may present the evidence against the inmate or ward to the adjustment committee.

(b) The implementation of a pre-hearing investigation shall be within the facility administrator's discretion. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-16 *Notice.* (a) The inmate or ward shall receive prior notice that an adjustment committee hearing will be held regarding the individual.

(b) Within a reasonable time, not less than twenty-four hours before the hearing, the charged inmate or

ward shall be served with written notice of the time and place of the adjustment committee hearing, what the specific charges are, including a brief notation of the facts. If the inmate or ward waives the twenty-four hour period, the waiver shall be reduced to writing and signed by the inmate or ward on the face of the notice.

(c) The inmate or ward or counsel substitute shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(d) The misconduct report or summary shall briefly contain the following:

(1) The specific rule violated;

(2) The facts supporting the charge;

(3) Any unusual inmate or ward behavior;

(4) Any staff or inmate or ward witnesses; the disposition of any physical evidence (e.g., weapons); and

(5) Any immediate action taken. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-17 *Hearing.* (a) The inmate or ward has a right to appear at the adjustment committee hearing, except where institutional safety or the good government of the facility would be jeopardized. If the individual is excluded from the hearing, reasons shall be given in writing. If the inmate or ward declines to attend the hearing, it shall be held regardless of the inmate's or ward's absence.

(b) The committee shall explain the reason for the hearing and the nature of the charge or charges against the inmate or ward. The inmate or ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(1) A plea of guilty eliminates the need to consider other evidence against the inmate or ward who shall then be given an opportunity to explain the actions or offer evidence in mitigation.

(2) A plea of not guilty necessitates the consideration of evidence against the inmate or ward.

(c) The inmate or ward shall be advised of the right to remain silent, but that silence may be used as a permissible inference of guilt. An inmate or ward cannot, however, be compelled to testify against oneself without the granting of immunity and may not be required to waive that immunity.

(d) Formal rules of evidence shall not apply. The committee may rely on any form of evidence, documentary, or testimonial, that it believes is reliable.

(e) Confrontation and cross examination:

(1) The inmate or ward may be given the privilege to confront and cross examine adverse witnesses.

(2) The committee may deny confrontation and cross examination and identification of adverse witnesses if in its judgment such a confrontation would:

(A) Subject the witnesses to potential reprisal;

(B) Jeopardize the security or good government of the facility;

(C) Be unduly hazardous to the facility's safety or correctional goals; or

(D) Otherwise reasonably appear to be impractical or unwarranted.

(3) If confrontation and cross examination and identification of adverse witnesses are denied, the committee is encouraged to enter in the record of the proceeding and make available to the inmate or ward an explanation for the denial. Additionally, the inmate or ward may be given an oral or written summary of the confidential evidence against the individual and provided an opportunity to respond.

(f) The inmate or ward shall be given an opportunity to respond to evidence against the inmate or ward, explain the alleged misconduct, or offer evidence of mitigation.

(1) The inmate or ward should be permitted to call witnesses and present evidence of defense as long as it will not be unduly hazardous to institutional safety or correctional goals.

(2) The committee may deny the inmate's or ward's calling of certain witnesses or presentation of certain evidence, after being given an offer of proof as to the nature of the evidence, for reasons such as:

(A) Irrelevance;

(B) Lack of necessity;

(C) The hazards presented in individual cases; or

(D) Any other justifiable reason.

In this regard, the committee may keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate or ward to be heard. The committee is encouraged to state the reason for the refusal.

(g) An inmate or ward shall be permitted to employ counsel substitute. A counsel substitute shall be a member of the facility staff who did not actively participate in the process by which the individual was brought before the committee or, in the facility administrator's discretion, a sufficiently competent inmate or ward designated by the facility staff. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-18 *Findings.* (a) The inmate or ward has a right to be apprised of the findings of the adjustment committee.

(b) Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:

(1) The inmate or ward admits the violation or pleads guilty.

(2) The charge is supported by substantial evidence.

(c) The inmate or ward shall be given a brief written summary of the committee's findings which shall be entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason or reasons therefor must be set forth in the findings. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-19 *Punishment.* (a) The adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited, provided that physical force may be employed for self defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate or ward pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the adjustment committee:

(1) Temporary loss of privileges.

(2) Segregation or confinement not longer than sixty days, provided that a longer period may be imposed with the expressed written approval of the corrections division administrator, and the committee shall review the

inmate's or ward's confinement at least once every thirty days.

(3) Any other punishment deemed necessary by the adjustment committee.

(b) The committee may also refer the matter to the program committee for further action. A description of the basic living levels of disciplinary confinement shall be as provided in subsections (c) to (h).

(c) The quarters used for segregation should be ventilated, adequately lighted, and maintained in a sanitary condition by the inmate or ward at all times. Normally, a segregated inmate or ward should be entitled to clothing, and bedding. If an inmate or ward is likely to destroy the clothing or bedding, injure oneself, or create a disturbance detrimental to others, or for other good reasons, materials may be removed from the cell until the condition which prompted removal subsides.

(d) Segregated inmates or wards shall be given an adequately nutritious diet.

(e) Segregated inmates or wards shall maintain an acceptable level of personal hygiene.

(f) Each segregated inmate or ward should be permitted indoor or outdoor exercise, unless security or institutional government dictates otherwise.

(g) Personal property will ordinarily be impounded, inventoried, and receipted.

(h) Normally, religious and legal materials are permitted. However, inmates or wards may be denied all reading and legal materials during temporary confinement for not longer than fifteen days. Access to legal

materials shall be permitted if an inmate or ward demonstrates the need for the materials and for prompt access to the courts in preparation of a habeas corpus petition or other application for relief. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-20 *Review.* (a) Each inmate or ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of the day of receipt of the committee's decision.

(b) The facility administrator may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may demand any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

APPENDIX "G"

Department of Social Services and Housing
Corrections Division

MISCONDUCT REPORT

Facility HHSF

Prepared on: 8-13-87

TO: MARIANO, Eugene ACO VI
(Watch Supervisor)

FROM: FURTADO, Gordon ACO III
(Name, title - Reporting Officer)

RE: X CONNER, Demont SSN: _____
(Name of Violator) (ID Number)

FACTS CONCERNING THE MISCONDUCT:
(Give time occurred/discovered, rule(s) violated, location, what happened and time the incident ceased or was corrected.)

On Thu. Aug. 13, 1987 at approx. 0900 hrs. I ACO G. FURTADO while on duty in Module A along with ACO R. AHUNA escorted INMATE D. CONNER from his cell (quad II) to the module program area. At this time I informed Inmate CONNER to move against the wall to be strip-searched before leaving the module. Inmate CONNER then stripped, faced the wall and squatted. I then asked Inmate CONNER to put both hands on the wall and lift up both feet one at a time to which he did with no incident.

I then asked him to step back, bend over and with both hands spread his buttocks so that I could check for contraband in the rectal area to which he said "Fuck!" in an angry tone of voice. This part of the search was thus

completed, but as Inmate CONNER turned around and faced this writer he stared at me and stated "Why are you harassing me?" I informed him that I'm just following a routine procedure. He then stated in a very sarcastic voice "What you got something personal against me! Why you harassing me?" I then told him all you have to do is just listen and follow what I tell you to do but Inmate CONNER just kept on making sarcastic remarks about being harassed and the way that this writer was doing kishis job.

At this time because of the tense atmosphere and also the very provoking attitude towards this writer, Sgt. SUMMERS who witnessed this incident cancelled Inmate CONNER's privilege of religious counselling. Inmate CONNER was then escorted back to his cell by this wrier and ACO D. COELHO.

It should be noted that as Inmate CONNER went through the strip search procedures he moved very slow and questioned every move as if trying to hinder the search, hoping that this writer might overlook a certain area. Inmate CONNER appeared to be very unruly in his attitude a towards this writer.

It appears that Inmate D. CONNER is in violation of CD rules sec. 17-201-7 #14 & 16, 17-201-9 #5 & #12.

INVESTIGATION: (by supervisor – statements of violator, witness(es))

On Friday, 8/14/87 at approximately 1935 hrs. this writer interviewed inmate CONNERS concerning an alleged misconduct. CONNERS was apprised of his constitutional rights and the charges against him.

CONNERS claims that he did not swear at ACO FURTADO and did not disobey any order given by ACO FURTADO, CONNERS claims that ACO FURTADO was unreasonable in the strip search procedure and that ACO FURTADO did not show him (CONNERS) any respect. CONNERS also feels that the staff treats inmates like dogs when they are being stripped and humiliates inmates.

At that time I explained to inmate CONNERS that ACO FURTADO was only following orders in his (ACO FURTADO's) strip searching techniques and that all inmates are to be searched in the same manner.

Subsequently, I talked to ACO FURTADO concerning the incident and from ACO FURTADO's testimony the search was conducted properly in a professional manner. As a result of this investigation there appears to be probable cause that inmate CONNERS may be in violation of the DSSH Inmate Handbook/Rules And Regulations and that this matter be referred to the adjustment committee.

R. JOHNSON, ACO IV, HCF
/s/ R. Johnson

FINDINGS:

[ ] Guilty

[ ] Not Guilty

[X] Referred to Adjustment Committee

CHARGE(S)	RULE #
17-201-7 The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.	14 & 16
17-201-9 Using abusive or obscene language to a staff member.	5
17-201-9 Harassment of employees.	12

INFORMAL ADJUSTMENT BY SUPERVISOR:

[ ] Withdrawal of: _____
(specify)

[ ] Extra Work assigned
[ ] Confinement

PERIOD OF CORRECTIVE ACTION:

_____ hours, OR

Beginning _____ . _____
(time) (day)

and ending _____ . _____
BY: _____
(Name, supervisor)
_____ DATE: _____
(Title)

_____

STATE OF HAWAII
Department of Social Services and Housing
Corrections Division

Facility HHSF
Conner, Demont
(Name) (Number)

NOTICE OF REPORT OF MISCONDUCT

Date Aug. 25, 1987 Time 1200 hrs.
(Date)

- You are herein notified that a written report of misconduct was filed against you on Aug. 13, 1987 . A copy of the charge(s) are listed below.

- A hearing on the charge(s) has been scheduled and you are to be present at HHSF PBHR ,
(Location)
0900 hrs. , on Aug. 28, , 1987 .
(Time) (Date)

As required by Corrections Division procedure, this hearing has been scheduled to determine the facts and administer just corrective action. You have the right to: 1) Have any charge explained to you; 2) Question those who have made any charge against you and examine any written material concerning the charge; 3) Explain any charge brought against you; 4) Request an administrative review through the adjustment process.

Charge(s): 17-201-7 (14) & (16); The use of physical interference or obstcale [sic] resulting in the obstruction, hindrance, or impairment of the performance of a correctional funtion [sic] by a public servant.

17-201-9 (5); Using abusive or obscene language to a staff mmember [sic].

17-201-9 (12); Harassment of employees.

Facts supporting the charge(s) are as stated on the attached Misconduct Report.

/s/ Cinda Sandin
Chairman

Receipt of notice of charges and rights:

I acknowledge receipt of the above charges. I understand that I: may ___/ may not X, have legal counsel present at the hearing. I also understand that I have 24 hours notice prior to the hearing.

I do ___ I do not X waive legal counsel.

I do ___ I do not X waive my right to 24 hour prior notice.

Date: 8/25/87 Signature: /s/ Demont R.D. Conner
(Resident)

Findings and Disposition of Corrective Action: FINDINGS: The Adjustment Hearing was held 8/28/87. The Committee consisted of UM Cinda Sandin (Chairman), SW Carolyn Corley and ACO Shook. The inmate pled not guilty to the three charges. The inmate was found not guilty of 17-201-7(14) & (16)

DISPOSITION: 17-201-7 (14 & 16) 30 days disciplinary segregation.
17-201-9(5) 4 hours disciplinary segregation concurrent

17-201-9(12) 4 hours disciplinary segregation concurrent

17-201-7(14 & 16) **charges are expunged. NOT GUILTY ON BOTH COUNTS.** The segregation period will run from 8/31/87 to 9/29/87.*

Evidence relied upon for decision: The Committee based their decision upon the inmate's statements that during the strip search procedure he turned around after squatting and looked at the ACO. He was then directed to "spead his cheeks" by ACO Furtado as part of the new strip search procedure. He felt angry, humiliated and apprehensive. He then "eyed up" ACO Furtado and was hesitant to comply. He further indicated that he dislikes ACO Furtado and feels he should not work on the module. The inmate admitted saying the word "fuck" during the procedure. The Committee also reviewed the submitted reports. Witnesses were unavailable due to move to the medium facility and being short staffed on the modules.

/s/ Cinda Sandin — 8/31/87
Committee Chairman — Date

Receipt of findings and disposition:

/s/ Demont R.D. Conner — 8/31/87
Inmate — Date

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* [This exhibit reflects the ultimate disposition of the charges. Conner was originally found guilty of all charges lodged against him.]